ORIGINAL

NO. 45687-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

AMALGAMATED TRANSIT UNION, LOCAL 1384,

Appellant

v.

KITSAP TRANSIT and the
PUBLIC EMPLOYMENT RELATIONS COMMISSION,

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

The Amalgamated Transit Union ("ATU"), Local 1384 represents two separate bargaining units of Operators for the Routed and ACCESS bus drivers employed by Kitsap Transit. Pursuant to the collective bargaining agreements between ATU and Kitsap Transit and by long-standing practice, ATU's members had been guaranteed the option of two different health insurance plans – a Preferred Provider Option ("PPO") plan offered through Premera and a Health Management Organization ("HMO") plan offered through Group Health. At the end of 2010, Kitsap Transit unilaterally discontinued the Premera plan without negotiating this change in an important benefit with ATU. As a result, ATU filed a number of unfair labor practice ("ULP") complaints against Kitsap Transit with the Public Employment Relations Commission ("PERC").

Following a multi-day hearing, Hearing Examiner Jessica Bradley issued a detailed opinion finding that Kitsap Transit had committed a series of unfair labor practices, including the decision to unilaterally discontinue the Premera plan. As part of the remedial order, the Examiner required Kitsap Transit to restore the *status quo ante* by reestablishing a substantially equivalent plan to the Premera plan. To make the members whole for this loss, the Order also mandated that Kitsap Transit pay to the affected members the difference in monthly premiums between the

Premera and Group Health plans from the time of the loss until the benefit was restored or there was a mutual agreement to change plans.

Kitsap Transit appealed the decision, but the full PERC Commission upheld the Examiner's findings of fact and conclusions of law in their entirety. However, the Commission modified the Order, relieving Kitsap Transit of the obligation to restore the status quo as well as the obligation to pay the affected members back for the difference in premium costs between the Premera and Group Health plans. ATU filed this petition for review challenging the modification of the Examiner's Order on the grounds that such modification violates several provisions of the Administrative Procedures Act ("APA"). The Superior Court affirmed the Commission's decision, which Order is now on appeal.

II. ASSIGNMENTS OF ERROR

A. Errors Assigned.

The Appellant, Amalgamated Transit Union, Local 1384, asserts that the Thurston County Superior Court made the following errors:

1. Issuing an Order affirming the decision of the Public Employment Relations Commission, in Decisions 11098-B (PECB, 2013) and 11099-B (PECB, 2013); and

2. Issuing an Order denying the Appellant/Petitioner's Motion to Submit New Evidence into the Record.

B. Issues Presented.

The ATU Local 1384 presents the following issues relating to these

assigned errors:

1. PERC has a statutory responsibility to issue appropriate remedial orders that effectuate the purposes and policy of RCW Chapter 41.56 upon the finding of an unfair labor practice. Part of the standard remedy when an employer refuses to bargain and makes a unilateral change in a mandatory subject of bargaining is a requirement that they restore the *status quo ante*. Did PERC violate its statutory obligations when it relieved the employer, Kitsap Transit, of the obligation to remedy their unfair labor practice by restoring the status quo on the grounds that compliance with this aspect of the remedy may be impossible? (Assignment of Error No. 1)

2. Adjudicative decisions by an agency, under the Administrative Procedures Act, must be supported by the evidence on the record and based on a correct interpretation of the law. In modifying the Order of the Hearing Examiner relieving Kitsap Transit of the obligation to restore the *status quo ante*, PERC based this modification on a view that compliance may be impossible without citing to anything in the record and in contravention of material in the record contradicting such a determination. Did PERC err in modifying the Examiner's Order based on evidence not contained in the record? (Assignment of Error No. 1)

3. The payment of damages to remedy the commission of an unfair labor practice is expressly authorized as part of PERC's remedial authority and has been found to be part of the standard make-whole remedy. The Order requiring Kitsap Transit to pay affected employees the difference in premium costs between the Premera and Group Health insurance plans directly represents the value of the loss of this insurance plan and is necessary to make employees whole as a result of Kitsap Transit's unfair labor practice. Did PERC err in concluding such an award was "punitive" in nature and not consistent with the make-whole remedy that is part of the standard remedy issued by PERC? (Assignment of Error No. 1)

4. The Administrative Procedures Act permits the courts to receive additional evidence outside of the agency record when the evidence relates to the validity of the agency's decision at

the time it was issued and is material to that adjudicative opinion. The evidence pertains to the availability of a substitute health plan substantially similar to the discontinued Premera plan, and thus bears directly on the PERC's finding concerning the availability of alternative plans. Did the Superior Court err in failing to admit this new evidence into the record for consideration as to the validity of the agency action? (Assignment of Error No. 2)

5. Alternatively, the Administrative Procedures Act allows the court to remand a matter back to an agency for consideration of further fact-finding proceedings when new evidence becomes available that relates to the agency's adjudication and the party was under no duty to discover it until the final decision and the interests of justice would be served by a remand. The need for any evidence concerning the availability of substantially similar health plans at Kitsap Transit did not fully materialize until the agency rendered its decision finding that compliance with this part of the Examiner's Order could prove impossible. Did the Superior Court err in alternatively failing to remand the matter back to the agency for further fact-finding proceedings? (Assignment of Error No. 2).

III. STATEMENT OF CASE

ATU consists of two bargaining units for which there are two separate collective bargaining agreements, [CR[1] 150:14-18][2] which establish the status quo on health insurance [*See* CR 793-851; CR 967-969; CR 1100-1102; CR 154:9-16].[3] The Premera medical plan was a

[1] The record references in this brief are generally to the original PERC record, which should have been transferred to this Court, and short-cited as "CR."
[2] The ATU members who are Operators on the Routed Service routes are covered in one CBA (CR 860), and those Operators for the ACCESS Service routes are covered in another CBA (CR 979).
[3] The Routed CBA requires Kitsap to pay certain premium amounts for "medical insurance provided by Premera Blue Cross, Group Health, and Vision Service Plan." While the ACCESS CBA does not identify specific insurance providers, the practice is

PPO plan, which among many attractive features: had national coverage [CR 347:10-23] and allowed patients to go to a specialist without having to take the time to wait for a referral from their primary care physician [CR 346:7-16]; go to an out of network doctor and still receive coverage [CR 344:11-20]; and go directly to a specialist without having to first obtain a referral [CR 346:13-14]. Kitsap Transit's Group HMO plan is purchased through the Association of Washington Cities ("AWC") [CR 156: 14-22], and requires employees to select a primary care physician at one of the limited Group Health facilities who would be responsible for managing and coordinating all of the employee's care, and to whom the employee must go for all referrals [CR 345:12-18; CR 346:7-17].[4] The choices available to employees for providers, hospitals, doctors, and clinics in the Premera network are much broader than the Group Health ("GH") network because Premera varies from area to area, even within the same state [CR333:14-20; CR 228:2-23].

Knowing that Kitsap Transit was required to maintain the status quo on its health plans, as set forth in the most recent CBAs, Jeff

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that ACCESS members receive the same provider options as the Routed members. Employees in the Machinists and Teamsters group and the non-represented employees also had Premera as a medical insurance option. For the 2010 year, about 50% of Kitsap employees opted for the Premera PPO medical plan, with the other 50% were covered by Group Health. ATU is the largest of these groups with 158 members.

[4] Unlike a PPO, under an HMO plan, if you go to a doctor outside of the Group Health network or fail to obtain a referral for a specialist, the employee will mostly likely have to pay out of pocket for most or all of the out of network care.

Cartwright, the Human Resources Director, nevertheless decided in March 2010 that the employer was spending too much money on employee health insurance [CR 1034-1036]. Without notifying ATU of its plans, Cartwright requested its medical broker, John Wallen, to find a cheaper plan to replace Premera's PPO [CR 1034-1036]. But, Cartwright warned Wallen that the new PPO plan must have the same benefits as the 2010 Premera plan because otherwise, he would have to negotiate with ATU, and "it [would] take three years to get through it," and require Kitsap Transit to maintain the enhanced Premera PPO benefit during that time [CR 1061-1062].

By mid-September 2010, Kitsap Transit received a 2011 renewal bid from Premera to maintain the 2010 benefits [CR 505:1-504:4].[5] Yet, still looking to save some money, Cartwright began negotiations with the Machinists and Teamsters ("M&T") group on September 27th to find alternative solutions to Premera, including removing members from Premera [CR 1063-1072]. Wallen warned Cartwright that without the M&T members on Premera, the number of remaining employees covered would fall below 100 [CR 506: 1-388:11],[6] and the "plan design [Kitsap was] currently under would not be available." [CR 1085]. Nonetheless,

[5] Kitsap could have accepted Premera's bid, ensuring that it had a PPO plan for its employees.
[6] Falling below the 100 life cutoff would violate Premera's underwriting criteria.

Cartwright callously moved forward to negotiate the M&T group off Premera.

Substantiating Wallen's warnings, Wallen learned on September 29th that due to underwriting requirements, Premera would not be able to offer coverage for just the remaining ATU members [CR 1086-1087]. Wallen told Cartwright that he also was "not particularly optimistic" that, should Kitsap Transit move forward with removing the M&T members from Premera, other carriers would have a different response [CR 1086-1087]. Wallen explored a few possible alternatives, but during the hearing ATU presented expert testimony that other options beyond those explored by Wallen were available to Kitsap Transit, in particular a self-funded plan administered by Cigna Healthcare, likely would have been a comparable option if Wallen had done his due diligence [CR 1338-1340; CR 338-342].

After learning that without the M&T members in the PPO census, other carriers would be hesitant to cover just ATU's members, Cartwright should have decided not to take actions that would prevent it from offering ATU a PPO option. Instead, Cartwright assured Wallen that they may just move the ATU folks to whatever other plan we come up with, pay the difference out of pocket to make them whole and negotiate from there [CR 1086-1087; CR 747-749].

One week later, Cartwright told Wallen that Kitsap Transit was

going to incentivize a move to GH in an effort to move *more people* off Premera and save *more* money [CR 1088-1089]. In offering an incentive for employees to select the GH HMO plan, Cartwright blatantly disregarded the fact that the selection bias toward GH would interfere with Premera's willingness to offer a quote.

After already negotiating with the M&T group and taking further action with respect to the non-represented employees, Cartwright finally approached ATU about the incentive on October 25th, but gave no indication that its PPO option might be in jeopardy [CR 1105-1113]. Cartwright informed Rita DiIenno, ATU's business agent, of the incentive it planned to offer ATU members to move them from the Premera plan to the GH plan [CR 1105-1113], but Cartwright inaccurately represented to DiIenno that he was "uncertain if there [would] be any impact to the current PPO benefit level, with or without this incentive." [CR 1105-1113]. Yet, prior to even having the opportunity to negotiate over the incentive, and less than two weeks before open enrollment was to begin, Cartwright sent DiIenno an email on November 5, 2010, informing her *for the first time* that KT was unable to offer *any PPO* plan to ATU members [CR 1124; CR 758:2-6].[7]

[7] In his email, Cartwright told DiIenno that Kitsap had exhausted its options to find a replacement plan, but that it had not considered PEBB because of the small number of

Thereafter, DiIenno met with Cartwright several times in an attempt to reach a negotiated solution. Due to the employer's refusal to consider any of ATU's proposals, negotiations quickly collapsed. Their first meeting was on November 15th, where ATU offered several suggestions for ways to reach a resolution [CR 229:9-18; CR 1166].[8] Having these rejected by Kitsap, ATU offered to accept the loss of a PPO plan if Kitsap paid ATU members the savings of three-years worth of the agency's expected premium savings [CR 1170-1171]. Kitsap Transit refused, reiterating that ATU members could either select the GH plan or go without coverage. On November 18, 2010, another negotiation session was held, but was equally as unsuccessful [CR 1170-1171; CR 229:3-25]. A final meeting was scheduled for November 30th, but was never held because Kitsap refused to counteroffer ATU's offer [CR 1170-1171, CR 1181-1187; CR 230:1-25].

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employees to be covered, the benefits were "less rich," and it would take "at least three months for the lengthy application process." Of course, Cartwright also failed to mention the direct effect that its incentive to move people *off* Premera had on Kitsap's ability to secure a replacement PPO plan from GH and other carriers and his efforts to move the M&T Group off Premera altogether. While Cartwight testified that Group Health Options pulled back its bid in part because of the financial incentive Kitsap offered, he told DiIenno that "the carries have simply refused to quote a bid."

[8] ATU suggested Kitsap move out of AWC and contract directly with Group Health for both the HMO and Options Plans, self-insure the ATU members, or, in the absence of having a PPO at all, take the savings Kitsap would realize from the change and give it to the ATU members. Kitsap refused to consider any of ATU's suggestions and stressed that the only choice they would offer ATU members was the option to select the AWC GH plan or to go without medical coverage.

On January 1, 2011, the only medical plan offered to ATU employees was the GH HMO plan. Several ATU members and their families experienced severe personal hardships due to the switch to Group Health from Premera, which were painstakingly testified to during the hearing [CR 251:5-12; CR 257:5-12; CR 388:1-6; CR 387:22-25; CR 395: 1-13; CR 396:10-25; CR 1238-1294]. Consequently, ATU filed a ULP with PERC alleging various unlawful acts in unilaterally removing the Premera health plan that constituted a refusal to bargain and interference violation contrary to RCW 41.56.140, subsections (1) and (4) [CR 61-96]. Following a multi-day hearing and post-hearing briefing by the parties, Examiner Bradley concluded that Kitsap Transit's actions were unlawful through their unilateral actions of removing the Premera health plan, not bargaining in good faith over the removal, and by unilaterally offering an incentive to ATU's members to move to the GH Plan [CR 1869-1910].

With respect to the crafting of a remedy, Examiner Bradley astutely noted:

> The purpose of ordering a return to the status quo is to ensure the offending party is precluded from enjoying the benefits of its unlawful act and gaining an unlawful advantage at the bargaining table.... Bargaining unit employees who were on the Premera PPO plan or were intending to switch to the Premera PPO plan in 2011 were uniquely impacted by the employer's actions and decision to stop offering a PPO plan. These employees should be made whole for losses they suffered as a result of the employer's unlawful unilateral

> change in benefits.... Requiring the employer to pay employees for the loss of the Premera PPO health benefits is necessary to ensure that the purpose of the statue [sic] is carried out. An employer should not be permitted to profit from its unilateral actions at the expense of its represented employees. [CR 1896-1898]

Examiner Bradley, thus, ordered Kitsap Transit to restore the status quo, which is a standard remedy issued by PERC in unilateral change cases, by reinstating a substantially similar health plan to the one that was unlawfully removed. She also required Kitsap Transit to make ATU's members whole by paying them the difference in monthly premiums between the Premera and GH plans from the date of the loss until Kitsap Transit restored the benefit [CR 1896-1898].

Kitsap Transit appealed most of this decision, but on appeal the Commission agreed that the employer's actions were unlawful. The Commission, however, relieved Kitsap Transit of the ordinary responsibility in unilateral change cases of restoring the benefit, indicating that compliance may be "impossible." It also significantly diminished the Examiner's make whole remedy by relieving the employer from paying the difference in premium costs between the Premera and GH health plans from the time of the loss until the benefit was restored [CR 1972-1988].

IV. SUMMARY OF ARGUMENT

A central policy of the Public Employees Collective Bargaining Act ("PECBA"), RCW Chapter 41.56, is to ensure that an employer and

the union bargain in good faith over any changes in employee wages, hours, and working conditions, commonly referred to as mandatory subjects of bargaining. If an employer fails to engage in bargaining, or if it makes a unilateral change to a mandatory subject, this is considered an unfair labor practice for the refusal to bargain. Upon finding that a ULP has occurred, PERC is statutorily required to issue appropriate remedial orders that affirmatively effectuate the purposes and policy of the PECBA.

While PERC has been provided considerable discretion in crafting remedial orders, it has consistently issued a common set of remedies, what it calls the "standard remedy," when a ULP involving a unilateral change in a mandatory subject of bargaining has been found. Those standard remedies consist of a requirement for the offending party to cease and desist, restore the *status quo ante*; make employees whole, post notices of the violation, and publicly read the notice at an official meeting of elected officials. The Commission itself has noted that any deviation from the standard remedy is itself an "extraordinary remedy" and must be used sparingly based on the unique circumstances of a case.

In modifying the Examiner's Order, the Commission acted outside the remedial requirements in RCW 41.56.160 and violated several provisions of the APA by issuing an Order that erroneously interpreted the law, was not supported by the evidence, and decided in an arbitrary and

capricious fashion. The two pieces of the Examiner's Order at issue herein involve a requirement for the employer to restore the status quo through the reinstatement of a plan substantially equivalent to Premera, and to make employees whole through the payment of damages suffered by the loss of the Premera plan. Those remedies are part of the standard remedy in cases of this nature, and the modification of this part of the Order was based on a faulty belief that compliance could prove to be "impossible" and that the make whole remedy was instead "punitive."

In relieving Kitsap Transit of the standard obligation to restore the status quo, the Commission mistakenly rested this decision on the grounds that compliance could be impossible, which conclusion is not supported by the record. In making this determination, the Commission failed to cite to a single piece of evidence in the record supporting this assumption. If the record had been properly reviewed, it would have been discovered that evidence was produced showing, in fact, that an alternative option could have been available to Kitsap Transit if all options had appropriately been considered, negating the conclusion that restoring a substantially equivalent plan would be "impossible."

Separately, the Examiner's Order requiring Kitsap Transit to make employees whole for the loss by paying employees the premium savings between the Premera and Group Health plans was a make whole remedy

that is specifically authorized under the statute. The Commission's modification of this part of the Order, was mistakenly characterized as "punitive" and the new part of the Order fails to make the employees remotely whole for the loss. In labeling this part of the Examiner's Order "punitive" the Commission failed to understand the health insurance market and that the difference in monthly premiums between the two plans represents their fair value and, in turn, the loss suffered by those employees who lost access to the Premera plan. The remedy issued by the Examiner is the most logical and complete way to make employees whole for this loss, and it is the type of damage payment expressly authorized by the statute to effectuate the purposes of PECBA.

Finally, ATU appeals a denial of its motion to submit new evidence into the record as permitted by RCW 34.05.562. The evidence, concerning negotiations over, and an eventual agreement on, a new health plan deemed substantially similar to the Premera plan unilaterally removed by Kitsap Transit, relates directly to the Commission's decision at the time it was issued wherein they found compliance with an order to restore the status quo to be impossible. The need for this evidence only arose upon the Commission issuing its decision modifying the Order and finding compliance to be impossible, and the evidence bears directly on a material fact in the agency decision. Alternatively, the matter should have

been remanded back to PERC with directions to conduct further fact-finding, as separately authorized under RCW 34.05.562.

V. ARGUMENT

A. Standard of Review

This case involves a Petition for Review of an administrative decision in an adjudicative proceeding. As such, it is governed by the review procedures of the APA defined in RCW 34.05.570(3):

> Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:
>
> (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
>
> (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
>
> (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
>
> (d) The agency has erroneously interpreted or applied the law;
>
> (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
>
> (f) The agency has not decided all issues requiring resolution by the agency;
>
> (g) A motion for disqualification under *RCW 34.05.425* or *34.12.050* was made and was improperly denied or, if no

motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

In *Pasco Police Officers' Association v. City of Pasco*, the Supreme Court described the appropriate standard of review of PERC rulings:

> Decisions of PERC in unfair labor practice cases are reviewable under the standards set forth in the Administrative Procedures Act. *City of Pasco.* RCW 34.05.570(3) permits relief from an agency order if the agency erroneously interpreted or applied the law. *Pasco*, 119 Wn.2d at 507. Under the error of law standard, the court may substitute its interpretation of the law for that of PERC. *Public School Employees v. PERC*, 77 Wn. App. 741, 745, 893 P.2d 1132, *review denied,* 127 Wn.2d 1019, 904 P.2d 300 (1995). *See also Pasco,* 119 Wn.2d at 507 ("an agency is charged with the administration and enforcement of a statute, the agency's interpretation of the statute is accorded great weight in determining legislative intent when a statute is ambiguous.") (*citing Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992). The court may also grant relief from an agency order if it finds that the order "is not supported by evidence that is substantial when viewed in light of the whole record before the court . . . ." RCW 34.05.570(3)(e).[9]

As this case was resolved on a summary judgment basis, it is subject to *de novo* review. The Superior Court's Order simply affirmed

[9] 132 Wn.2d 450, 458, 938 P.2d 827 (1997).

the Commission decisions at issue in the petition for review, which decisions themselves affirmed, in their entirety, the findings of fact and conclusions of law made by the Hearing Examiner.[10] The standard of review is heightened in an enforcement action. Where a court is "called upon to lend its coercive power to the proceedings" it must be "satisfied that the administrative determination is correct."[11]

The court of appeals does not defer to the Superior Court but instead reviews the underlying agency action.[12] "On review of an agency decision, this court 'sits in the same position as the superior court' and applies the standards of the APA to the record before the agency."[13] As indicated in RCW 34.05.574(1), a reviewing court should normally remand an errant agency action rather than rewrite the administrative order:

> In a review under RCW 34.05.57, the court may (a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order. The court shall set out in its findings and conclusions, as appropriate, each violation or

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[10] CP 408-413.
[11] *Highline Community College v. Higher Education Personnel Board*, 45 Wn.App 803, 809, 727 P.2d 990 (1986), *review denied*, 107 Wn.3d 1030 (1987).
[12] *See Postema v. Pollution Control Hearing Board*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000).
[13] *Purse Seine Vessel Owners Association, et al..v. State*, 92 Wn. App. 381, 388, 966 P.2d 928 (1998); citing *Tapper v. Employment Sec. Dep't,* 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

> error by the agency under the standards for review set out in this chapter on which the court bases its decision and order. In reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency. The court shall remand to the agency for modification of agency action, unless remand is impracticable or would cause unnecessary delay.

B. The Public Employment Relations Commission Erred in Modifying a Portion of the Hearing Examiner's Remedial Order Against Kitsap Transit by Deviating from the Standard Remedy

1. PERC is Statutorily Obligated to Issue Appropriate Remedial Orders Upon Finding an Unfair Labor Practice in order to Effectuate the Purpose of the PECBA

ATU and Kitsap Transit are governed by RCW Chapter 41.56, commonly referred to as PECBA. The statutes makes it an "unfair labor practice for an employer or union "to refuse to engage in collective bargaining."[14] "Collective bargaining" is defined in the statute to mean:

> Collective bargaining means the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an appropriate bargaining unit of such public employer...[15]

Thus, the duty to bargain extends to "wages, hours and working conditions." In its decisions herein, the Commission properly described

[14] RCW 41.56.140; RCW 41.56.150.
[15] RCW 41.56.030(4).

the general duty to collectively bargain:

> Under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, a public employer has a duty to bargain with the exclusive bargaining representative of its employees. RCW 41.56.030(4). "[P]ersonnel matters, including wages, hours, and working conditions" of bargaining unit employees are characterized as mandatory subjects of bargaining. *City of Richland*, Decision 2448-B (PECB, 1987), *remanded*; *International Association of Fire Fighters, Local Union 1052 v. Public Employment Relations Commission*, 113 Wn.2d 197 (1989); *Federal Way School District*, Decision 232-A (EDUC, 1977), *citing NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). The collective bargaining obligation requires that the employer maintain status quo for all mandatory subjects of bargaining, except when such changes are made in conformity with the statutory collective bargaining obligation or the terms of a collective bargaining agreement. *King County*, Decision 10547-A (PECB, 2010), *citing City of Yakima*, Decision 3501-A (PECB, 1998), *aff'd*, 117 Wn.2d 655 (1991).[16]

The Washington State Supreme Court has taken notice of the fact that the purpose of the PECBA "is to provide public employees with the right to join and be represented by labor organizations of their own choosing, and to provide for a uniform basis for implementing that right."[17] With that goal in mind, when an employer commits an unfair labor practice by failing to engage in collective bargaining, the PECBA grants PERC the authority to remedy the violation(s) in order to protect

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[16] CR 1975.

[17] *Metro. Seattle v. Public Employment Relations Com.*, 118 Wn.2d 621, 633, 826 P.2d 158 (1992); citing *Yakima v. International Ass'n of Fire Fighters, Local 469*, 117 Wn.2d 655, 670, 818 P.2d 1076 (1991).

the purpose of the statute. To that end, RCW 41.56.160 expressly authorizes and requires the Commission to issue remedial orders following ULP findings, noting:

> (1) The Commission is empowered and ***directed*** to prevent any unfair labor practice and ***to issue appropriate remedial orders...***
>
> (2) If the Commission determines that any person has engaged in or is engaging in an unfair labor practice, the Commission *shall issue* and cause to be served upon the person an order requiring the person to cease and desist from such unfair labor practice, ***and to take such affirmative action as will effectuate the purposes and policy of this chapter***, such as the payment of damages and the reinstatement of employees.[18]

The phrase "appropriate remedial orders" has been interpreted by the State Supreme Court to mean "those [orders] necessary to effectuate the purposes of the collective bargaining statute and to make PERC's lawful orders effective."[19] To achieve this goal, the Court of Appeals has observed:

> [the] function of the remedy in an unfair labor practice case is to restore the situation, as nearly as possible, to that which would have occurred but for the violation. The remedy *must* help restrain violations and remove or avoid the consequences of the violations.[20]

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[18] RCW 41.56.160 (emphasis supplied).
[19] *Metro. Seattle,* 118 Wn.2d at 633.
[20] *Metro. Seattle v. Public Employment Relations Com*, 60 Wn. App. 232, 240, 803 P.2d 41 (1991) (overruled on other grounds) (emphasis supplied).

2. PERC Has Routinely Determined that the Standard Remedy Necessary to Effectuate the Purpose of the Chapter Upon Finding a ULP Includes a Make Whole Award and Restoration of the *Status Quo Ante*

The State courts have repeatedly noted that PERC is to be provided considerable discretion in fashioning remedies; however, in exercising this charge the Commission has been directed to consider that the remedial aspects of PECBA "should be liberally construed to effect its purpose" when crafting orders to remedy ULP violations.[21] While the Commission is given authority to issue appropriate orders, it has been tasked to craft such awards in ways that "are consistent with the purposes of the act, and that are necessary to make [its] orders effective...."[22]

Consistent with this charge, the Commission has, on numerous occasions, commented on its remedial power and what it considers to be a "standard remedy" for a unilateral change ULP violation in contrast to what it considers more "extraordinary remedies." "The standard remedy for an unilateral change unfair labor practice violation includes ordering the offending party to cease and desist and, if necessary, to restore the *status quo*; make employees whole; post notices of the violation; publicly

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[21] *Local Union No. 469, International Association of Fire Fighters v. City of Yakima*, 91 Wn.2d 101, 109, 587 P.2d 165 (1978).
[22] *Metro. Seattle*, 118 Wn.2d at 634-35.

read the notice; and order the parties to bargain from the *status quo*."[23] "The purpose of ordering a return to the status quo is to ensure the offending party is precluded from enjoying the benefits of its unlawful act and gaining an unlawful advantage at the bargaining table."[24]

In contrast, "extraordinary remedies" are reserved for situations involving egregious or repetitive misconduct, including in some cases dilatory tactics if it constitutes a pattern of conduct showing a patent disregard of a party's good faith bargaining obligations.[25] The typical extraordinary remedy is awarding attorneys' fees and costs.[26] Less common extraordinary remedies include totally voiding a labor agreement, ordering interest arbitration, and requiring labor relations training.[27]

Both categories of remedies can include monetary damages.[28] In the case of standard remedies, a make whole remedy is a form of monetary damages. "Generally, a 'make whole' remedy requires any wages,

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[23] *University of Washington*, Decision 11499-A (PSRA, 2013) *citing State – Department of Corrections*, Decision 11060-A; *Kitsap Transit*, Decision 11098-B citing *City of Anacortes,* Decision 6863-B (PECB, 2001).
[24] *Kitsap County*, Decision 10836-A (PECB, 2011) citing *Lewis County*, Decision 10571-A (PECB, 2011).
[25] *See PUD 1 of Clark County,* Decision 3815-A (PECB, 1992).
[26] *See e.g. City of Bremerton*, Decision 6006-A (PECB, 1998); *Seattle School District*, Decision 5733-B (PECB, 1998); *Mansfield School District*, Decision 5238-A (EDUC, 1996); *PUD 1 of Clark County*, Decision 3815 (PECB, 1991); *City of Kelso*, Decision 2633 (PECB, 1988).
[27] *See e.g. Snohomish County*, Decision 9834-B (PECB, 2008); *Western Washington University*, Decision 9309-A (PSRA, 2008).
[28] *City of Tukwila,* Decision 10536-B (PECB, 2010).

benefits, or working conditions that were lost or unlawfully modified as a result of the employer's unilateral act to be restored or reinstated."[29] No remedy can be punitive and it cannot be something that is beyond what can be obtained at the bargaining table.[30]

Restoration of that *status quo ante* of any mandatory subjects of bargaining and payment of monetary damages has long been recognized as the standard remedy in an overwhelming number of PERC decisions involving unilateral changes to mandatory subjects.[31] In *Skagit County,* the Commission reversed an Examiner's order in a unilateral change unfair

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[29] *Kennewick Public Hospital District 1*, Decision 4815-A (PECB, 1996), citing *METRO*, Decision 2845-A (PECB, 1988).

[30] *Kitsap Transit*, Decision 11098-B (PECB, 2013), citing *City of Burlington*, Decision 5841-A (PECB, 1997); *Pierce County*, Decision 1840-A (PECB, 1985); RCW 41.56.160.

[31] *See Skagit County*, Decision 8886-A (PECB, 2007) ("The restoration of the *status quo ante* is a common remedy in unilateral change cases . . ."); *City of Mukilteo*, Decision 9452-A ("The standard remedy for a unilateral change violation is restoring the status quo that existed prior to the unilateral change . . ."); *City of Kalama*, Decision 6739-A (PECB, 2001) citing *City of Kalama*, Decision 6853-A (PECB, 2000) ("[T]he remedial orders issued by the Commission are designed to put the employee(s) affected by unfair labor practices back to the same position they would have enjoyed if no unfair labor practice had been committed."); *Wenatchee School District*, Decision 11138-A (PECB, 2012) ("The employer will reinstate the past practice of paying stipends to LIT employees."); *Yakima Valley Community College*, Decision 11326-A (PECB, 2013) (The Examiner restored the status quo ante by reinstating the wages, hours and working conditions that existed prior to the unilateral change. The remedy ordered by the Examiner is the standard remedy when a unilateral change is found, and we do not disturb the remedy.); *City of Tacoma*, Decision 11097-A (PECB, 2012) (The Commission found that a restoration of the status quo was necessary to return the aggrieved party to the conditions that existed before the unfair labor practice); *City of Tukwila*, Decision 10536-B (PECB, 2010) (The Commission found that "[B]argaining unit employees are entitled to a restoration of any mandatory subjects of bargaining that were affected or modified due to the employer's unilateral act. Because some employees used sick leave or vacation time on days that they were previously scheduled to have off in order to offset the impacts of the unlawful schedule change, those employees are entitled to restoration of expended sick or vacation time.").

labor practice violation because the Examiner did not order restoration of the *status quo ante*.[32] Moreover, PERC has previously held that health insurance benefits are mandatory subjects of bargaining and has ordered restoration of *status quo ante* and payment of damages in such cases. For example, in *Snohomish County*, a self-insured employer was ordered to honor the terms of the parties' CBA regarding health insurance premiums, specifically that the employer reimburse employees for any offset premium contributions or augmented benefits in the amount equivalent to the amounts provided to other represented employees.[33]

"Deviation from the standard remedy, including not ordering a portion of the standard remedy, is an extraordinary remedy."[34] PERC decisions expressly state that "extraordinary remedies are used sparingly,"[35] and "when the standard remedy will suffice, Examiners should not grant extraordinary remedies."[36]

The State courts have endorsed the basic approach repeatedly

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[32] Decision 8886-A (PECB, 2007) (Ordering the employer is ordered to reimburse any deductible for dental service expended by bargaining unit employees as a result of the employer's decision).
[33] *Snohomish County,* Decision 9834-B (PSRA, 2008)(Stating, "although this is not a typical unilateral change case, where the employees would be awarded restitution based upon the employer's action, the employer failed to maintain the status quo with respect to the terms and conditions of employment for at least one year.").
[34] *University of Washington*, Decision 11499-A (PSRA, 2013)
[35] *University of Washington*, Decision 11499-A (PSRA, 2013) *citing State – Department of Corrections*, Decision 11060-A; *Seattle School District*, Decision 5542-C (PECB, 1997)
[36] *University of Washington*, Decision 11499-A (PSRA, 2013)

taken by PERC when it comes to remedying unilateral change ULP violations. The Court of Appeals has plainly stated:

> [t]he function of the remedy in an unfair labor practice case is to restore the situation, as nearly as possible, to that which would have occurred but for the violation. The remedy must help restrain violations and remove or avoid the consequences of the violations.[37]

Federal court decisions interpreting similar provisions under the National Labor Relations Act ("NLRA") in reviewing administrative decisions issued by the National Labor Relations Board ("NLRB") have expressed similar views to that of the Washington courts, which the State Supreme Court has deemed as persuasive authority.[38]

In *NLRB v. Keystone Steel & Wire, Div. of Keystone Consol. Industries, Inc*, the 7th Circuit—like Washington courts—found the standard remedy in unilateral change cases to be a restoration of the status quo. Specifically, it found that the NLRB (the Board) "drawing on its expertise in industrial relations, must attempt to create 'a restoration of the situation, as nearly as possible, to that which would have obtained' but for the unfair labor practices."[39] In this case (*NLRB v. Keystone Steel & Wire*)

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[37] *Metro. Seattle*, 60 Wn. App. at 240.
[38] The Washington Supreme Court has held that PECBA is substantially similar to the NLRA and thus decisions interpreting that Act based upon similar provisions in PECBA, "while not controlling, are persuasive." *State ex. Rel. Wash. Fed'n of State Employees v. Bd. Of Trs.*, 93 Wn.2d 60, 68, 605 P.2d 1252 (1980).
[39] *NLRB v. Keystone Steel & Wire, Div. of Keystone Consol. Industries, Inc.*, 653 F.2d 304, 307 (7th Cir. 1981).

that meant "require[ing] the Company to restore all benefits enjoyed by the employees before the change in administrators, including the labor consultant and any health benefits reduced by the change."[40]

> The Board's order here is a traditional "make whole" order which this court and others typically have upheld in unlawful unilateral change cases where the orders provide both for restoration of working conditions or benefits improperly denied and for monetary compensation for any losses sustained.
>
> . . .
>
> Board's policy in cases of combined favorable and unfavorable unilateral changes is to order a return to the status quo ante with regard to the unfavorable changes, but to not penalize employees by ordering revocation of the favorable changes. We endorse the Board's policy.[41]

The NLRB has specifically awarded these standard remedies when an employer unilateral changes a mandatory subject of bargaining, including health insurance benefits. In *Modern International Graphics Inc.,* the Board ordered an employer that was found to have unlawfully failed and refused to continue to provide health insurance, to pay accrued vacation and severance pay, and to accept and process grievances to rescind the changes and make unit employees whole for any loss of earnings and other benefits and to restore health insurance attributable to

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[40] *Id.* at 307-308.
[41] *Id.* at 308.

its unlawful conduct.[42] The Board explained, "[W]e shall order the Respondent to restore the unit employees' health care coverage and reimburse the unit employees for any expenses ensuing from the Respondent's failure to continue health care coverage."[43]

In another recent case, the NLRB ordered an employer that unilaterally implemented a new health insurance plan to rescind that plan upon union's request, restore coverage that was in effect before unlawful change, and make employees whole for any monetary losses they suffered as result of unlawful change.[44] The Board acknowledged, however, that the employer may litigate in compliance whether it would be impossible or unduly or unfairly burdensome to restore prior insurance coverage, and if the union chooses to continue new insurance plan, the make-whole relief for unilateral change would be inapplicable.[45]

3. PERC Erred When it Issued an Extraordinary Remedy Overturning the Examiner's Order to Require Kitsap Transit to Restore the *Status Quo Ante*

a. PERC's Finding that Restoring the Status Quo May be Impossible Contradicts the Administrative Record and is Arbitrary and Capricious

In affirming the decision of the Hearing Examiner, the

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[42] 189 LRRM 1367 (N.L.R.B. 2010).
[43] *Id.*
[44] *Comau Inc.*, 190 LRRM 1079 (N.L.R.B. 2010).
[45] *Id.*

Commission adopted the findings of fact and conclusions of law issued by Examiner Bradley in their entirety. The only deviations from the Examiner's decision ordered by the Commission were modifications to two aspects of the Examiner's Order upon which the original findings and conclusions were based—one being a modification to the Order that relieved Kitsap Transit of the obligation to restore the *status quo ante*.[46]

Justifying this deviation, in its decisions, the Commission states on ***three separate occasions*** – whereby it explained its rationale for modifying the Order concerning the status quo restoration – that it believes compliance with that part of the Examiner's Order could prove to be impossible based on the evidence in the case. Specifically, the Commission first notes in its opinion: "In this case, it is ***not possible*** to make the employees whole by requiring the employer to reinstate the PPO plan."[47] Shortly thereafter, it went on to find: "The ***evidence demonstrates*** that the employer would be ***unable to reinstate*** a health insurance plan with benefit levels substantially equivalent to the Premera PPO plan it ceased offering on December 31...."[48] Finally, the Commission concludes: "***On these facts***, we decline to order the employer to reinstate a health insurance plan with benefit levels substantially

[46] CR 1986.
[47] CR 1984.
[48] CR 1984-85.

equivalent to those the employer unilaterally ceased offering, because ***compliance could be an impossibility.***"[49] While these statements are only in the opinion and not formal findings of fact or conclusions of law, they are the only known basis by which the Commission justified modifying this aspect of the Examiner's Order.

Under the APA, this Court is authorized to overturn PERC's determination on this issue because the modification of the Order was arbitrary in its application, contrary to the evidence in the record, and inconsistent with PERC's own remedial procedure. On at least two occasions, the Commission makes a vague reference to the "evidence" of the case and certain "facts" in justifying its decision; yet, there is not a single citation to any part of the record in support of such a statement. Additionally, the evidence actually in the record contradicts such a finding. The Examiner's Order was for Kitsap Transit to reinstate a health insurance plan with benefit levels *substantially equivalent* to the Premera PPO plan or another plan as agreed upon by the union.[50] The actual evidence in the record shows that both options were a distinct possibility.

As noted by the Examiner, the loss of the Premera plan at the end of 2010 was the direct product of artificial conditions that were self-

[49] CR 1985.
[50] CR 1905.

created by Kitsap Transit, including: (1) moving the Machinists & Teamsters union to another health plan; (2) making the Premera plan unavailable to the non-represented employees; and (3) incentivizing everyone in the workforce to move over to the Group Health Plan.[51] Prior to those measures taken by Kitsap Transit, Premera had already offered to re-bid its plan for the following calendar year.[52] As noted by Kitsap Transit's insurance broker, John Wallen, Premera only subsequently reneged on its offer after Kitsap Transit took the above-identified actions and the remaining insurance pool for the Premera plan was too small.

For the Commission to conclude that reinstatement of the Premera plan would prove to be "impossible," such a conclusion necessarily accepts that the manipulative conditions imposed by Kitsap Transit would remain in place in perpetuity. Absent those conditions, the record shows that Premera was more than willing to re-bid the same basic plan in the following calendar year. If the conditions artificially created by Kitsap Transit were removed, there is no rational reason to conclude the Premera plan would be "impossible" to secure since it would have remained in place but for the unlawful actions taken by Kitsap Transit.

Notwithstanding the foregoing, the Examiner's Order provided an

[51] CR 1887-88.
[52] CR 504-05; CR 1079-84.

alternative means for compliance should restoring the precise Premera plan at this late juncture prove problematic. The Examiner's Order stated, as is often the case in these situations, that Kitsap Transit could satisfy this part of the Order by locating an alternative plan with *substantially equivalent benefits*. For the Commission's statements around the "impossibility" of compliance there would need to be some evidence that a substantially equivalent plan was not, and remains, impossible. Again, the record here contradicts the Commission's conclusion.

ATU called an expert witness in the insurance industry, Brian McCulloch, who testified to the fact that Kitsap Transit's broker, Mr. Wallen, had overlooked the possibility of moving to a self-funded option that could have allowed Kitsap Transit to maintain a substantially equivalent level of benefits as existed under Premera.[53] Mr. McCulloch was actually able to locate a health care provider, Cigna Health Network, who indicated they would have served as a plan administrator for this self-funding option with just the demographic data of the remaining ATU members during this relevant period of time. While Kitsap Transit has tried to attack the credibility of this evidence and the expertise of Mr. McCulloch, the reality is that evidence showing the availability of at least

[53] CR 342-43; CR 1338-1340.

one alternative plan belies this notion expressed by the Commission that compliance with such an order would be impossible. Even if this was the only alternative, the presence of one alternative is direct evidence that compliance was not impossible; therefore, for the Commission to modify the Order on these grounds, which contradicts the record, is arbitrary and should be overturned.

Finally, the absurdity of this conclusion reached by the Commission has subsequently been completely exposed by the fact that, subsequent to these decisions, Kitsap Transit and ATU *actually agreed upon, and implemented*, the restoration of a health care plan that both sides agreed was *substantially equivalent to the Premera plan* lost at the end of 2010. At the proceedings below, ATU sought to introduce evidence of this fact, which is allowable under the APA, to demonstrate that the Commission's belief of impossibility was erroneous because, per the Examiner's Order, a *substantially equivalent plan had actually been subsequently implemented.* The Superior Court's decision to deny the admission of this evidence is a separate issue on appeal herein, and will be briefed below, but ATU believes this evidence should be admitted and is highly relevant because it directly contradicts the Commission's determination of "impossibility."

Even in the absence of these subsequent events, the Examiner's

Order could have been satisfied by implementing another plan option "as agreed upon by the union."[54] The Commission has offered no articulate rationale for concluding that complying with this alternative option in the Order would in any way be impossible. On what grounds was it reasonable for the Commission to determine that ATU would not have agreed to another option if implementing a plan with substantially equivalent benefits did not prove feasible? Labeling such an option as an "impossibility" in the absence of supporting evidence meets the very definition of arbitrary.

b. PERC's Deviation from the Standard Remedy Requiring Restoration of the Status Quo Fails to Effectuate the Purpose of the PECBA

PERC has a statutory obligation to issue appropriate remedial orders that are designed to effectuate the purpose and policy of RCW Chapter 41.56. One of the central tenets of PECBA is to prohibit employers from making unilateral changes in wages, hours, and working conditions and to instead collectively bargain, in good faith, over any such changes affecting mandatory subjects of bargaining. For this critically important reason, PERC has repeatedly found over the years that if an employer bypasses its good faith bargaining obligations and unilaterally changes a wage, hour, or working condition, one of the critical ways to

[54] CR 1905

remedy such a violation and maintain the integrity of PECBA is to require the employer to essentially undo that change and start over, by restoring the *status quo ante*, and to henceforth, bargain in good faith with the union over any desired change. Such a remedy is the most logical and direct way to give effect to this important policy parameter in PECBA.

For this very reason, the Commission has admonished its own hearing examiners for deviating from the standard remedy in these cases and selecting an extraordinary remedy unless the unique facts of a particular case specifically warrant such a deviation. In this case, however, there is nothing unique about what happened other than the brazen disregard of its collective bargaining responsibilities taken by Kitsap Transit. For the aforementioned reasons, the Commission was simply wrong in determining that compliance with an order requiring the restoration of the status quo could prove impossible. As the Commission has itself noted, deviating from the standard remedy is itself an extraordinary remedy. In the absence of specific reasons justifying such a deviation, to effectuate the purpose of RCW Chapter 41.56, as the Commission has itself repeatedly recognized, an order requiring a restoration of the *status quo ante* is minimally necessary for PERC to carry out its obligations under the law. This Court, under the APA, is empowered to ensure this occurs and that the agency carries out the

mandate imposed on it by the State Legislature.

4. PERC Erred in Modifying the Examiner's Make Whole Award of Monetary Damages by Arbitrarily Concluding the Award was Punitive

a. The Examiner's Order Requiring the Payment of Kitsap Transit's Premium Savings to the Employees was a Make-Whole Award and Not Punitive in Nature

The second piece of the Order at issue concerns the Examiner's mandate requiring Kitsap Transit to pay the affected ATU members (who were on the Premera plan or intended to go to it in 2011) the amount of the premium savings (determined by taking the differential between the 2011 Premera monthly premium and the 2011 Group Health monthly premium, minus employee contribution amounts) from the time of the unilateral change until such time a comparable plan is restored or the benefit is changed in the collective bargaining agreement.[55] In explaining her rationale behind this part of the Order, the Examiner noted:

> Requiring the employer to pay employees for the loss of the Premera PPO health benefits is necessary to ensure that the purpose of the statue is carried out. An employer should not be permitted to profit from its unilateral actions at the expense of its represented employees. If the employer were not required to pay employees back for the health benefit savings it achieved though implementing unlawful unilateral changes to mandatory subjects of bargaining there would be no incentive for employers to comply with the law and negotiate changes to benefits. These payments are the most practical way to *make employees whole* for the loss in

[55] CR 1905-06.

benefits they have suffered...[56]

In overturning this part of the Order, the Commission indicated that it agreed with the employer that this remedy "appears to be punitive," and as such, the role of the Commission is not to grant a remedy that could not be "obtained at the bargaining table."[57] On top of the fact that the Commission failed to recognize that the Examiner expressly stated this part of the award was designed to "make employees whole" and had no punitive intent, their decision is arbitrary for failing to issue an appropriate make whole remedy that incorporates a critical understanding of the health insurance market, as was properly done by the Examiner.

All health insurance plans are not equal. Health insurance in the U.S. is a competitive multi-billion dollar marketplace with numerous providers and plan specifications. One of the critical differences between a PPO-style plan offered by Premera and an HMO-style plan offered by Group Health concerns the patient's control over their health care. Most PPO-type plans provide insured individuals access to an array of different physicians and medical experts that they can access directly through their plan in addition to any primary care physician the patient may have.[58] In contrast, central to the Group Health model is the idea of managed care,

[56] CR 1898.
[57] CR 1984.
[58] CR 344-47.

meaning patients within the Group Health network generally must work through a primary care physician for all of their care and it is up to that primary care physician to refer the patient to other specialists, within the Group Health network, if more specific care is required.[59] While there are pros and cons to both models, they are undoubtedly different and are valued differently in the open marketplace.

In 2010, despite a nearly identical number of covered lives under both the Premera and Group Health plans, Kitsap Transit was projecting an annual cost in excess of $2.4 million for the Premera plan in contrast to approximately $1.3 million for Group Health.[60] There are likely many factors contributing to the large price discrepancy in the plans, but these plans compete in an open marketplace and it is logical to conclude that the prices reflect the overall value of the product to the consumer. If we are to assume, as most economists would do, that the consumer operates in a rational way, why would an almost identical number of employees at Kitsap Transit select a plan that was significantly more expensive than an alternative competing product if, in fact, both plans held the same value? The answer, of course, is that the two plans do not have the same value, and many people selected the Premera plan, even though it was more

[59] CR 345-47.
[60] CR 1047.

expensive, because they found it to hold more value than the Group Health plan. In other words, the benefit of having the Premera plan was seen by many consumers, working at Kitsap Transit, as worth the significantly higher cost, compared to Group Health, even though, on the surface, both plans do the same thing – provide health insurance.

Just as is the case with any product or service that is lost or damaged, there has to be a mechanism for valuing that product or service and making the consumer whole if the loss was the product of some unlawful or illegal act. In this situation, there is an obvious and fair way to monetize the value difference between these two health plans, which is to focus on the price difference in monthly premiums between the two plans. Instead of devising her own formula to try and make the employees whole for the loss of this more valuable Premera plan, the Examiner appropriately relied on the difference in the value already ascribed to the plans by the industry experts who wrote and priced the different plans.

The resulting difference in premiums best approximates the variance in value ascribed to the plans because the actuaries and other market experts working for these companies have already determined what it actually costs to offer these plans to consumers and how much those same consumers are willing to pay. Those cost and benefit differentials are a reasonable proxy for the overall value differences in the

plans because, as noted above, assuming the consumer is operating in a rational manner, the price they are willing to pay for the plans represents the value those plans hold. Thus, to make the employees whole for the loss they suffered through the elimination of the Premera plan, the most logical way to capture that loss is to rely on the difference in prices between the plans. That price differential then represents the amount of damages suffered by these employees when the plan was lost. An order requiring that differing amount to be paid back to the affected employees is the only reasonably way to proximately return them to a position they would have been in but for the unlawful change by Kitsap Transit.

This point is further confirmed by the fact that Kitsap Transit itself recognized the significant difference in value between the Premera and Group Health plans and itself monetized that difference in a way almost identical to what was originally ordered by the Hearing Examiner. One of the underlying issues in the original ULP case concerned Kitsap Transit's actions to offer an incentive to all of its employees to move off of Premera and over to Group Health, which same incentive was unlawfully offered to ATU's members. The incentive offered by Kitsap Transit was, in part, a one-time lump sum payment equal to three months of premium savings

between the two plans.[61] This is perhaps where the Examiner got the idea for this aspect of the Order, *since Kitsap Transit itself* used the difference in premiums between the two plans as a basis for developing an incentive system to encourage employees to migrate from Premera to Group Health. It defies all logic for the Commission to subsequently conclude such a formula was "punitive" when the employer certainly did not see it that way when it used *the exact same formula* as a basis for an incentive payment to encourage movement to the Group Health plan.

The modification of this part of the Order by the Commission erroneously views the Examiner's Order as "punitive" and then does little to actually make the employees whole for their loss. The Commission's modified Order only mandates Kitsap Transit to compensate affected ATU members by paying in differences in costs between what those members would have paid under the Premera plan less any payments made under the new Group Health plan. In substituting this miniscule amount from the Examiner's more complete make whole remedy, the Commission has failed to issue an appropriate remedial order that effectuates the purpose of the chapter and makes the employees whole for the loss they suffered as the result of Kitsap Transit's unlawful act.

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[61] CR 1188-1203.

b. PERC Has Routinely Found that the Standard Make-Whole Remedy Can Include the Payment of Damages

In detailing the affirmative actions to be taken by the Commission to remedy an unfair labor practice, RCW 41.56.160 specifically lists, among those actions to be taken, as to include "the payment of damages and the reinstatement of employees." As part of this charge, PERC has found that "[t]he standard remedy for a unilateral change violation is restoring the status quo that existed prior to the unilateral change, making employees whole for any loss of wages, benefits, or working conditions... and reading that notice into the record at a public meeting of the employer's governing body."[62]

In an effort to ensure the employer does not gain an advantage through its unlawful acts, PERC has had occasion in the past to order the payment of damages as part of the standard make-whole remedy. In *City of Kalama*[63], the Commission affirmed a decision that the employer unlawfully removed a take-home car benefit, but amended the original order to include:

> Make whole all bargaining unit members for their expenses for commuting between work and home during the period from the effective date of termination of the take-home-car policy on or about March 31, 1998, until the effective date of

[62] *Lewis County*, Decision 10571-A (PECB, 2011), (citing *City of Anacortes*, Decision 6863-A (PECB, 2001), citing *Seattle School District*, Decision 5733-A (PECB, 1997).
[63] Decision 6853-A (PECB, 2000).

> the reinstatement of the take-home-car policy pursuant to the Examiner's order, by payment to them at the business milage [sic] rate(s) in effect at that time under regulations of the federal Internal Revenue Service multiplied by their round-trip mileage.[64]

The Order in this case by Examiner Bradley is modeled on the same concept as ordered by the Commission in *City of Kalama.* In a sense, the employees in that case received payments they would not otherwise have received but for the unlawful removal of their take-home cars. But, because that change occurred, to prevent the employer from reaping the rewards of its unlawful act and to make the employees whole, PERC has previously found a cash payment, like the one originally ordered herein, to be appropriate.

The goal of Kitsap Transit all along was to reduce their costs in terms of how much of their budget was expended on medical insurance. They accomplished their goal by unlawfully removing the much more expensive Premera plan and only leaving in place a cheaper Group Health option. Even though this act has been upheld by the Commission as an unlawful ULP, in the absence of an order along the lines proscribed by the Examiner, Kitsap Transit is permitted to retain its ill-gotten gains, while the employees and ATU remain in a disadvantaged position through the loss of a more valuable health insurance plan that was unilaterally

[64] *Id.*

removed by the employer without bargaining.

It is true that the cash payments that the affected members were to have received under the Examiner's Order would not have ordinarily inured to them in the absence of these events. However, it is a most elemental concept in the American legal system, as part of the common law tradition, that when a contract is breached and an agreed-upon service or product is not provided, the damages suffered in that loss are monetized by the legal system through the payment of damages.[65] RCW 41.56.160(2) specifically recognizes and permits the "payment of damages" to remedy the occurrence of an unfair labor practice, and that is precisely what this part of the Examiner's Order accomplishes. The Examiner's Order is consistent with past PERC orders in analogous cases, and it is the only way to effectuate the purposes of PECBA in this case.

C. The Superior Court Erred by Denying Amalgamated Transit Union's Motion to Submit New Evidence

1. The Superior Court Erred in Not Admitting New Evidence under the APA that Pertained Directly to the Validity of the Commission's Decision

"A court considering a petition for judicial review may not generally admit new evidence or decide disputed factual issues."[66] However, the judicial record may be "supplemented by additional

[65] Restatement (Second) of Contracts §346, §347 (1981).
[66] *Herman v. Shoreline Hearings Bd.*, 149 Wn. App. 444, 455, 204 P.3d 928 (2009).

evidence allowed by the Administrative Procedure Act."[67] Such an exception is provided in RCW 34.05.562(1), which states:

> The court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding: (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action; (b) Unlawfulness of procedure or of decision-making process; or (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

The evidence that ATU sought to have admitted into the record by the Superior Court is admissible under subsection (1)(c) of RCW 34.05.562 because it relates directly to the action by the Commission at the time of their decision and is a material fact relevant to that adjudicative decision by the agency. Specifically, the evidence concerns a declaration by ATU President, Gregory Sanders, and accompanying exhibits in support of the declaration, demonstrating that during the same time period the Commission was drafting a ruling on Kitsap Transit's appeal, the ATU and Kitsap Transit were in contract negotiations that also included, and ultimately resulted in, an agreement to restore a substantially equivalent health plan as compared to the Premera plan that was unilaterally removed at the end of 2010. The Superior Court erred in not permitting the record

[67] *U.S. West Comm., Inc. v. Utils. & Transp. Comm'n.*, 134 Wn.2d 48, 72, 949 P.2d 1321 (1997).

to be supplemented with this evidence because it had a direct and relevant bearing on the Commission's determination that restoring a substantially equivalent plan would be impossible.

Under the first prong of RCW 34.05.562, the "relevant agency action" that is at issue here and for which the evidence has a direct bearing upon is the Commission's decision to modify the Examiner's Order requiring Kitsap Transit to restore the *status quo ante*, which decision was ostensibly based on the supposition that compliance with this part of the Order could prove to be impossible. The agency action, therefore, was the issuance of its decision on March 21, 2013 wherein the determination about impossibility was first made. While ATU did submit evidence during the hearing about the availability of alternative health plans that could have been considered by Kitsap Transit, there was no reasonable way to anticipate the need to definitively prove a substitute plan was possible because that did not become an issue in the case until the Commission rendered its decision. Clearly, the Hearing Examiner, who heard and considered all the evidence, did not believe that restoring the Premera plan or a substantially equivalent plan would be impossible, since she was the one to order such a restoration. The question over the "impossibility" of compliance only ripened when the Commission made such a determination as justification for overriding this part of the

Examiner's Order.

Evidence concerning the availability of a substantially similar health plan is needed to resolve a dispute over the Commission's adjudicative decision because it directly bears on the underlying legal question of whether the Commission acted in an arbitrary and capricious fashion, issued an order not supported by the evidence, and erroneously interpreted the law. As noted above, the Commission's decision affirmed in their entirety the findings of fact and conclusions of law issued by the Hearing Examiner. Despite claims by the employer in the proceedings below[68] that the Examiner had made factual findings that no other PPO plan was available[69], this conclusion is nonsensical since the Examiner who issued these findings clearly felt that restoring the Premera plan or a substantially equivalent plan was possible since *she ordered Kitsap Transit to take that very step.* While adopting these findings and conclusions in

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[68] CP 144.

[69] The employer, in its briefing, has repeatedly cited to Findings of Fact No. 17 and 22 for the alleged proposition that the Premera plan would no longer be offered and no other insurer was willing to offer a plan. However, a close review of the actual findings made by the Examiner do not support the summary of the findings offered by the Employer. These findings stand for a far more limited proposition wherein the Examiner noted that as of September 29, 2010, following several steps by Kitsap Transit to move its other employees off Premera, the lone remaining ATU members would not meet the underwriting criteria for the Premera plan at that time. Further, Finding No. 22 simply states that the Employer's broker, John Wallen, was unable to locate a substitute insurance plan at such a late date under those same artificial conditions created by Kitsap Transit. This finding, in no way, stands for a broader proposition that no alternative plans actually existed.

their entirety, in its opinion the Commission made note of their belief – on three separate occasions in the decision – that compliance with the Examiner's Order requiring a restoration of the status quo ante would prove to be "impossible" *without one single citation to any aspect of the record* supporting or confirming such an observation.

The evidence offered by ATU to supplement the agency record, therefore, has a direct and material bearing in evaluating the merits of the Commission's decision because is bears on a material fact supporting a modification of the Examiner's Order that is at the heart of this proceeding. The Commission's Order is not supported by the record and erroneously interpreted the law in ordering an extraordinary remedy because the fact of the matter is that compliance with an order to restore the status quo is anything but impossible, which is best demonstrated by the fact that it has now actually happened and a substitute plan is in place.

2. In the Alternative, the Superior Court Erred in Not Remanding the Case to PERC With an Order to Conduct Further Fact-Finding

RCW 34.05.562(2) provides an alternative option for the court in the case of newly acquired evidence that is material to the petition for review that does not involve the immediate admission of the new evidence. Specifically, it states:

The court may remand a matter to the agency, before final

> disposition of a petition for review, with directions that the agency conduct fact-finding and other proceedings the court considers necessary and that the agency take such further action on the basis thereof as the court directs, if: ... (b) The court finds that (i) new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover or could not have reasonably been discovered until after the agency action, and (ii) the interests of justice would be served by remand to the agency[70]

If the evidence that ATU has sought to introduce is not directly received by the court under RCW 34.05.562(1), ATU posits in the alternative that prior to the final disposition of this matter, an order remanding the matter back to PERC with directions to conduct further fact finding would be appropriate under this secondary provision of RCW 34.05.562. PERC, itself, already has a procedure for conducting further fact finding hearings to resolve issues over compliance with an order, and so it would be equipped to conduct further proceedings to receive further evidence bearing on the question of whether compliance with the Examiner's Order requiring the restoration of the *status quo ante* was possible or not.

For many of the same reasons as detailed above, the first prong of this subsection of RCW 34.05.562 is satisfied because it relates directly to the Commission's decision, at the time of its decision, justifying a

[70] RCW 34.05.562(2)(b).

modification of the Order on the grounds of "impossibility," and ATU was under no duty to discover this information at the time of the original hearing because its relevance did not ripen until the Commission issued its final decision. The mandate that ATU now finds itself under, and what this evidence has a direct bearing on, is an obligation to demonstrate that compliance with the part of the Examiner's Order requiring a restoration of the status quo was not impossible, and as such, would not warrant the imposition of an extraordinary remedy by the Commission. Prior to the Commission's decision making such a finding, ATU was not in a position to introduce evidence on this point because there was no reasonable basis to conclude such an assumption existed and the record did not include such a determination. The materiality of the evidence only ripened once the Commission issued its decision, and so discovery of this information would not have preceded such an event.

The interests of justice are most certainly minimally served by a remand order for further fact-finding proceedings on this issue because the premise of "impossibility" in complying with this aspect of the Examiner's Order underlies the entire decision to modify this standard remedy into an extraordinary remedy. Evidence that has a direct bearing on the factual accuracy of such a finding will almost certainly have a material impact on the underlying legal determination concerning the

order modification. If the Commission believes that relieving Kitsap Transit of the standard obligation upon the occurrence of an unfair labor practice is warranted because of a factual belief that it would not be possible for the employer to comply, then the ATU should be allowed the opportunity to present evidence on this very point.

VI. CONCLUSION

PERC has a statutory obligation to issue appropriate remedial orders that effectuate the purpose of PECBA. In relieving Kitsap Transit of the standard legal obligation imposed on employers who commit unfair labor practices, by exempting it from having to restore the status quo ante and pay damages to ATU's members to make them whole for the loss of the Premera plan, PERC operated in a manner contrary to this statutory duty. The Commission's decision should be overturned, and the Hearing Examiner's Order should be restored in its entirety.

RESPECTFULLY SUBMITTED this 10th day of April, 2014, at Seattle, WA

CLINE & ASSOCIATES

By: _____

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CERTIFICATE OF SERVICE

I certify that on April 10, 2014, I caused to be filed via hand-delivered by a Legal Messenger the original of the foregoing *APPELLANT'S OPENING BRIEF*, and this *CERTIFICATE OF FILING & SERVICE* in the above-captioned matter. I further certify that on this same date, I caused to be served hand-delivered via Legal Messenger true and accurate copies of the same above-referenced documents on the party below:

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I certify and acknowledge under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington, this 10th day of April 2014.

Marga Bueno